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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 744.

ERNEST A. MISHNE,
and
GEORGE MISHNE,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition For Writ of Certiorari to the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

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TABLE OF CONTENTS.

Statement of Facts 1

Argument 6

1. Were petitioners' constitutional rights to due process and equal protection of the law denied by reason of the Trial Court's refusal to order the court reporter in attendance to record the final argument of the prosecutor? 7
2. Is the right to a fair trial vitiated when the prosecutor in final argument make allegations of fact which were not supported by the evidence and which concern important issues in the case? 9
3. Were petitioners denied a fair and impartial trial by reason of certain comments of the Trial Court tending to indicate to the jury that he favored the prosecution and believed the complaining witness? 10

Conclusion 11

TABLE OF CASES.

Alcorta v. Texas, 355 U. S. 28 (1957) 9

Buchalter v. New York, 319 U. S. 427 (1943) 9, 10

Chessman v. Teets, 350 U. S. 3 (1955) and 354 U. S. 156 (1957) 8

Cuyahoga River Power Co. v. The Northern Realty Co., 244 U. S. 300 (1917) 7

Eskridge v. Washington State Board of Prison Terms and Parole, 357 U. S. 214 (1957) 8

Griffin v. United States of America, 351 U. S. 12 (1955) 8

Mooney v. Holohan, 294 U. S. 103 (1935) 9

Napu v. Illinois, 360 U. S. 264 (1958) 9

Pyle v. Kansas, 317 U. S. 213 (1942) 9

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STATEMENT OF FACTS.

The Defendants, George Mishne and his son Ernest Mishne, operated a vending machine company out of a combination office-warehouse building in Chardon, Ohio, which used to be a garage. Their vending machines are placed in various commercial and industrial establishments in Geauga, Lake, Ashtabula, and Trumbull Counties. Robert Gregory worked for them for approximately one year and eight months. He quit or was fired in August of 1961.

Before he had left the employ of the Mishnes, Gregory wrote a check for twenty dollars to Hambden Gulf. This check was returned for insufficient funds. Fred Pierson, who worked at Hambden Gulf, received the check. After talking with Defendant George Mishne, and accompanied

by Jack Clause, an associate of George Mishne, Fred Pierson signed an affidavit in the Prosecutor's office charging Gregory with issuing a bad check (R. 456-465). In Geauga County the complaining witness is required to deposit fifteen dollars in County Court to assure the appearance of the witness at the hearing. George Mishne put up the money for this deposit (R. 464).

Gregory was arrested on this charge in Mecca, Ohio, where his wife operated a restaurant, by Trumbull County Sheriff Deputies and handed over to Geauga Deputies at the County line at approximately eleven p.m., September 8, 1961. They arrived at the Geauga County Jail in Chardon about twelve midnight. At approximately four a.m., September 9, 1961, George Mishne bailed Gregory out for one hundred dollars.

Approximately two and one-half hours after Deputy Tom Ohl put Gregory in jail he talked to Defendant George Mishne in Middlefield (R. 446-448). Mishne asked him if Gregory was going to be arrested, and was told that Gregory was in jail. Mishne wanted to know the amount of bail and if he could bail Gregory out. Ohl asked Mishne why he wanted Gregory arrested, and Mishne said that Gregory used to work for him, owed him money, and ruined a few good business stops, and to figure it out for himself, and forget he (Ohl) had ever seen Mishne. Ohl also said that he learned from Jack Clause, Mishne's business associate, that George Mishne wanted Fred Pierson to sign an affidavit charging Gregory with issuing a bad check so that Mishne would have reason to bring Gregory back.

At approximately three a.m. Chardon Village Police Patrolman Bill Niehus received a call from the Geauga County Sheriff's office to stop there. Niehus proceeded there (R. 304) where he found Defendant George Mishne.

who wanted to use Niehus as reference that his one hundred dollar check for Gregory's bond was good. Mishne was not successful in bonding Gregory out at this time. At about three-twenty a.m. Niehus again ran into Mishne at the south end of the Chardon Village Square (R. 306). Mishne called Niehus over to Mishne's truck where he told Niehus that he was going to bond Gregory out, take him down to the warehouse and talk to him about some bad checks. He asked Niehus to take Gregory down, if he would not go with Mishne. Niehus refused. Mishne then said that if Gregory became violent or tried to get away that he would "break the son of a bitch's legs" (R. 306).

The Chardon Telephone Company records show that two calls were made from a phone listed to George Mishne in Chardon to a phone listed to Ernest Mishne in Cleveland, said calls being made at 2:43 a.m. and 2:46 a.m., September 9, 1961 (R. 493). Ernest Mishne arrived in Chardon in time to be present when George Mishne bailed Gregory out of jail at approximately four a.m., September 9, 1961, and took Gregory to the warehouse.

Defendants George and Ernest Mishne took Gregory down to the warehouse, which is approximately one-half mile from the jail on the outskirts of Chardon Village. They arrived at approximately 4:05 a.m. For nearly one hour thereafter George and Ernest Mishne beat and kicked Gregory with a stick, a wrecking bar, with fists and boots, bruising and cutting him on various parts of his body and breaking his leg. When the police arrived they found Gregory soaking wet and badly injured. Defendant George Mishne, after the police arrived, when asked if he had anything to cover Gregory with, said, "Yes," then went into the warehouse and got a blanket (R. 316) and threw it on Gregory in a heap, saying, "That is more than the son of a bitch would do for me." Defendant George

Mishne then tried to ride in the ambulance with Gregory to the hospital (R. 319). Thereafter, the police searched the warehouse and the area in front. Gregory having said that he had been hit by a car, they looked in the area in front of the warehouse on the road, but found no evidence of a hit-and-run, such as broken glass, chrome, mud dropped from the fenders from impact, or blood (R. 319). The evidence is inconclusive as to whether or not there were skid marks on the road in the immediate area. There was blood on the gravel in front of the warehouse where Gregory had been lying when found by the police, but no evidence that Gregory had crawled there from the direction of the road. Defendant Ernest Mishne's statement (Defendant's Ex. OO) states that Gregory walked back into the warehouse after being hit by car (See State's Ex. 18, 19 showing Gregory's broken leg).

In the warehouse the police found evidence of blood spattered (R. 265) on cardboard boxes, evidence of an attempt to wipe the blood off of one box by the use of soap powder, a wooden stick with blood on it and human hair imbedded in it a splinter from the stick with a human hair imbedded in it. They also found that the cement floor and rubber mats were soaked with water. The weather that morning was clear and dry, according to Patrolman Niehus (R. 321) and other witnesses.

Gregory was the only eyewitness who testified as to what occurred in the warehouse and as to how he acquired his injuries. The only other witnesses who could have testified as to what did or did not occur in the warehouse between the hours of four and five a.m. that morning were the Defendants George and Ernest Mishne, both of whom chose not to testify.

Gregory was taken by ambulance to the Geauga Community Hospital, which is approximately seven miles from

the warehouse. There Gregory was interviewed by Chief B hl of the Chardon Police Department. Gregory at first told him that he had been involved in an auto accident, but shortly thereafter, five or six minutes (R. 166), he told Chief Bohl that he had been beaten up by Mr. Mishne and his son Ernie. Chief Bohl was present when Gregory made a statement which was later reduced to writing and signed by Gregory. This statement was substantially the same as given by Gregory during the trial.

Gregory's clothes, the wooden stick and splinter, two rubber mats, pieces of the cardboard boxes with the blood spatters and soap powder, and the human hair were taken personally by the Chardon Police to the Bureau of Criminal Identification in London, Ohio, for scientific analysis. Steve Molnar, lab technician from BCI, testified as to the articles. He identified the blood found as being human blood, but could not give the blood type because the blood had dried. He identified the hair as human hair similar in all respects to the sample hair given to him from Gregory's head. He found that some of the dirt imbedded in Gregory's trousers was similar to the dirt found on the rubber mats. He had examined Gregory's clothes for evidence that Gregory had been hit by a hit-skip, and found no evidence that he had been hit by a hit-skip.

Following trial, on June 12, 1962, the jury found both defendants guilty of assault with intent to maim, not guilty of assault with intent to kill and guilty of lesser degrees of assault and battery. George Mishne was found guilty of Counts 1, 2, 4, 5, 7, 8 and 10, but not guilty of Counts 3, 6, or 9, but only of the lesser offense of assault and battery. Ernest Mishne was found guilty of Counts 1, 2, 4, 5, and 10, but not guilty of Counts 3, 6, 7, 8, or 9, but on each of said counts guilty of lesser offense of assault and battery.

The appellants appealed from the judgment of the Common Pleas Court of Geauga County entered following this jury verdict against them and the denial of a motion for a new trial filed thereafter by the appellants.

The Court of Appeals affirmed the judgment on the verdict of the Court of Common Pleas and denied appellants' motion to certify the record on the ground of conflict.

The Supreme Court of Ohio denied defendants-appellants' motion for leave to appeal.

Defendants-appellants now petition for Writ of Certiorari to the Supreme Court of the United States.

ARGUMENT.

Before taking up the questions presented for review by Petitioners, the respondent will briefly go into the merits of the case.

In this criminal trial which lasted seven trial days the State put on sixteen witnesses, including the injured complaining witness, the investigating police officers, medical experts, and an expert criminal laboratory technician. From these witnesses the State elicited evidence which convinced the jury beyond a reasonable doubt that the Defendants were guilty of some of the charges.

None of the testimony of the State's witnesses was controverted by the defense witnesses. Neither defendant took the stand in his own behalf.

The defense put on six witnesses. Four of these witnesses were court record officials of other counties brought in by the defense to show the complaining witness' prior criminal record in an effort to discredit him. The other two defense witnesses, one of whom was an employee of defense counsel, testified as to skid marks on the roadway in front of the building where the beating occurred.

an attempt to bolster the defense theory that the injuries were caused by a hit-skip motorist.

It appeared from the first day of trial to its end that the theory of the defense was to discredit the complaining witness as much as possible, thoroughly cross-examine each state witness, and take advantage of every possibility of error. The valiant attempt to discredit the State's principal witness, the victim, was not consistent with the defense decision not to put the defendants on the stand.

Petitioners cite *Cuyahoga River Power Co. v. The Northern Realty Co.*, 244 U. S. 300 (1917) as authority that the judgment of the Court of Appeals for Geauga County, Ohio, becomes the final judgment of the highest Court of the State of Ohio. We do not dispute this. However, this case is also important to the respondent, for it also provides:

> "Where grounds are broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense, the Federal Supreme Court will not take jurisdiction of a writ of error to a state court."

We turn now to the questions presented for review by the petitioners.

1. Were petitioners' constitutional rights to due process and equal protection of the law denied by reason of the Trial Court's refusal to order the court reporter in attendance to record the final argument of the prosecutor?

We contend, and the State Appellate Court held, that this error, if prejudicial, was cured by the presentment by defense counsel of a narrative bill of exceptions. The contents of this narrative bill and an affidavit placed in the record by a private investigator who witnessed the

trial (R. 454), employed by defense counsel, were not disputed by the prosecution and were certified by the trial judge as being accurate records of that portion of the trial. In this way the defense preserved its record and the errors complained of.

Petitioners cite *Eskridge v. Washington State Board of Prison Terms and Parole*, 357 U. S. 214 (1957) in which it was found that the denial of a transcript of proceedings to an indigent person is a denial of due process and equal protection. However, in that case the court remarked that "there was nothing in the record to show that any adequate substitute for a court reporter's transcript was available to the appellant." The court also stated in that case that "under some circumstances notes compiled by someone other than the reporter could be an adequate substitute for a court reporter's transcript."

Petitioners also cite *Griffin v. United States of America*, 351 U. S. 12 (1955), which held that there should be no discrimination between indigent and non-indigent persons. But this case too seems rather to bolster respondent's position. In syllabus 10 it is stated:

> "The court does not hold that the state must purchase a transcript in every case where the defendant cannot buy it; there may be other means of affording adequate and effective appellate review, for instance upon a bystanders' bill of exceptions."

Chessman v. Teets, 350 U. S. 3 (1955) and 354 U. S. 156 (1957), also cited by petitioners, is a case involving settlement of a seriously disputed record at a proceedings in which the defendant was not represented either personally or by counsel. The court reporter died before preparing the transcript and the substitute, an uncle of the prosecutor, completed the record after conferring

with only police and prosecutor. This is not pertinent to the instant case in which the record is not disputed.

2. Is the right to a fair trial vitiated when the prosecutor in final argument makes allegations of fact which were not supported by the evidence and which concern important issues in the case?

Petitioners particularly refer to the prosecutor asserting that the motive for the crime was that the victim had taken certain business stops away from the defendants. This assertion was proper and was based on the testimony of Deputy Ohl at page 447 of the record:

> "I asked him (George Mishne, one of petitioners) why he wanted Mr. Gregory arrested, and he stated he used to work for him and had ruined a few good business places and he stated that Mr. Gregory owed him money and ruined a few good business places and to figure it out for myself and to forget I ever seen him that night."

The cases cited by petitioners (*Alcorta v. Texas*, 355 U. S. 28 (1957); *Mooney v. Holohan*, 294 U. S. 103 (1935); *Pyle v. Kansas*, 317 U. S. 213 (1942); *Napu v. Illinois*, 360 U. S. 264 (1958)) all are cases in which the prosecutor obtained convictions upon testimony known by him to be perjured and is not relevant here.

In the case of *Buchalter v. New York*, 319 U. S. 427 (1943) cited by petitioners, the 4th syllabus therein argues against the petitioners. It reads as follows:

> "The making of statements by the District Attorney in the course of a criminal trial do not raise a due process question reviewable in the Supreme Court of the United States."

3. Were petitioners denied a fair and impartial trial by reason of certain comments of the Trial Court tending to indicate to the jury that he favored the prosecution and believed the complaining witness?

The State Appellate Court and the State Supreme Court reviewed the petitioners' claims of error and found them without merit.

The case above referred to, *Buchalter v. New York*, *supra*, cited by petitioners, is again helpful to this respondent. On page 431 in his majority opinion, J. Roberts says:

> "That the due process clause of the 14th Amendment does not enable this Court to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law."

Also syllabus 2 of that same case reads as follows:

> "The 14th Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and criminal law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in the Supreme Court of the United States every ruling made in the course of a trial in a state court."

It is interesting to note that petitioners cited as their authority under this question only criminal cases heard in the Federal Circuit Courts of Appeals which originated in the Federal District Courts. The reason, of course, is that state cases involving this question and question No. 2 herein have been decided by state reviewing courts.

CONCLUSION.

As concluded by the jury and the trial court and in the words of the State Appellate Court, "There is only one reasonable explanation of what transpired on the morning of September 9 as revealed in this record, and that is the conclusion the jury reached that Robert Gregory underwent a brutal beating at the hands of these appellants." Petitioners' failure to testify in their own behalf further confirms this conclusion.

The failure to record the final argument of the prosecutor was not prejudicial to the defense, since defense counsel preserved his claims of error by filing a narrative bill of particulars and affidavits of court room bystanders, who incidentally were employed by said counsel. The facts alleged in the bill and affidavits were not controverted by the prosecution. The right to have a record taken is given by state law and the claimed error in denial of this right was fully reviewed by the state appellate courts.

Statements made by the prosecutor in final argument and comments made by the trial judge do not raise due process questions reviewable in the Supreme Court of the United States. This is the reason counsel for defense was unable to find Supreme Court cases in point on these two questions. For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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